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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1902~~ 180

NORMAN SEE,

Appellant,

vs.

CITY OF SEATTLE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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VS.

CITY OF SEATTLE,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Washington, entered on November 24, 1965, affirming the judgment of the Superior Court of the State of Washington for King County, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that substantial questions are presented.

Opinion Below

The opinion of the Supreme Court of the State of Washington is unofficially reported at 67 Wash. Decisions 2, No. 9, pages 465-476 (1966). The opinion is set forth in full in the appendix hereto, *infra*, pp. 11-23.

Jurisdiction

This appeal is from the affirmance of a conviction for the violation of Ordinance No. 87870, Chapter 8.01 of the Seattle City Ordinances, known as the Fire Code. Appellant was sentenced to pay a fine of $100 suspended and was assessed all costs incurred.

The conviction originated in the Superior Court of the State of Washington for King County on March 24, 1964, on trial *de novo* without a jury on stipulated facts (R. 11), following conviction in the Municipal Court of the City of Seattle, a court not of record. The conviction was sustained on appeal by the Supreme Court of the State of Washington on November 24, 1965 (R. 13-26). A petition for rehearing was denied on January 19, 1966 (R. 26). Notice of appeal was filed in the Supreme Court of the State of Washington on April 8, 1966 (R. 28-30).

The statutory provision which confers jurisdiction of the appeal upon this Court is 28 U. S. C. 1257(2). The following cases sustain the jurisdiction of this Court to review the criminal conviction of the appellant herein by appeal: *Frank* v. *Maryland,* 359 U. S. 360 (1959); *Ohio ex rel. Eaton* v. *Price,* 360 U. S. 246 (1959).

Questions Presented

1. Whether Ordinance No. 87870 of the City of Seattle, Washington, which authorizes the inspection of buildings and premises by the Fire Chief, for the safeguarding of life and property from the hazards of fire and explosion, without either a warrant, or probable cause to believe a

violation of the ordinance exists, violates the Fourth and Fourteenth Amendments to the United States Constitution.

2. Whether *Frank* v. *Maryland*, 359 U. S. 360 (1959) should be overruled.

Statute Involved

Seattle Ordinance No. 87870

Section 8.01.010:

Intent. This Title, referred to as the Fire Code, prescribes minimum standards for the safeguarding of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises. Hazards which are governed by specific reference shall also be subject to all other applicable provisions of this Title.

Section 8.01.050:

Inspection of building and premises. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards.

Section 8.01.120:

Definitions. . . . "DWELLING" means a building occupied exclusively for residence purposes and having not more

than two (2) dwelling units or as a boarding or rooming house serving not more than fifteen (15) persons with meals or sleeping accommodations or both.

Section 8.01.140:

Penalty. Anyone violating or failing to comply with any provision of this Title or Lawful order of the Fire Chief pursuant hereto shall, upon conviction thereof be punishable by a fine not to exceed Three Hundred Dollars ($300.00) or imprisonment in the City Jail for a period not to exceed ninety (90) days, or by both such fine and imprisonment, and each day of violation shall constitute a separate offense.

Statement[1]

That at all times mentioned herein, the defendant was and is the owner of certain premises at 1549 Northwest 49th Street, Seattle, King County, Washington, on which there is located a warehouse building, which premises were and are maintained as locked premises by defendant, and inaccessible to anyone except the defendant.

That on or about the 14th day of February, 1963, the City of Seattle Fire Department, through its authorized representative, demanded of the defendant that an inspection be allowed as to the said locked premises; that the said Fire Department did not procure a search warrant nor present such to defendant. That no claim was made that the said Fire Department had any reasonable cause to believe a violation of the ordinance existed at the time

[1] The statement of facts is taken verbatim from the stipulation of facts agreed to by the parties in the King County Superior Court (R. 1-2).

of the said demand. That the defendant, on said date, refused to allow the said Fire Department to make such inspection.

That on the 27th day of February, 1963, a warrant was issued for the arrest of the defendant for violation of City of Seattle Ordinance No. 87870, Section 8.01.050. That the cause proceeded to trial on the 15th day of March, 1963, upon a plea of not guilty, in Municipal Court before Judge Walter T. McGovern, and that defendant was adjudged guilty, appeal bond set at $100.00, which was paid, and appeal taken to Superior Court.

In Superior Court, King County, appellant raised and argued the claim that Ordinance No. 87870 authorizes unreasonable searches in violation of the Fourth Amendment to the United States Constitution (R. 2-3) and that the ordinance violates the Fourteenth Amendment to the United States Constitution (R. 3). The same claims were raised and argued on appeal to the Supreme Court of the State of Washington where they were explicitly rejected on the merits. Appendix, *infra*.

The Questions Are Substantial

1. *Ordinance No. 87870 Is Unconstitutional.*

The Supreme Court of Washington has held in this case that under the ordinance in issue, the Seattle Fire Chief or his representative may enter private commercial premises, to inspect for hazards of fire and explosion, without a warrant,[2] without probable cause or suspicion that any hazard

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[2] The ordinance makes no provision for securing a search warrant, nor was a warrant obtained in this case.

exists, nor as part of a systematic area-by-area search[3] or periodic inspection.[4]

Frank v. *Maryland, supra,* by a five-four vote, sustained the constitutionality of a city ordinance which authorized daylight inspection of buildings and premises without a warrant by Health Department officers who had cause to suspect the existence of a nuisance. Probable cause was in fact present in that case. 359 U. S. at 361, 366.

In sustaining the ordinance's constitutionality, Mr. Justice Frankfurter said:

> "The power of inspection granted by the Baltimore City Code is strictly limited, more exacting than the analogous provisions of many other municipal codes. Valid grounds for suspicion of the existence of a nuisance must exist. . . . The inspection must be made in the daytime." 359 U. S. at 366.

The ordinance in the case at bar is not "strictly limited." On its face, and as construed by the Supreme Court of Washington, the ordinance permits inspection of private premises, excluding the "interiors of dwellings," without a warrant and without "any reasonable cause to believe a violation of the ordinance existed at the time . . ." 67 Wash. Decisions 2, No. 9, at 466; appendix, *infra,* p. 11.

The court below, notwithstanding the absence of any restrictive standards in the ordinance, rested its decision on the distinction between standards of reasonableness, in the Fourth Amendment sense, required to search business property as contrasted to the search of a man's home or

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[3] *Frank* v. *Maryland, supra,* at 372.

[4] *Id.* at 383 (Douglas, *J.*, dissenting).

dwelling. The court relied upon *Davis* v. *United States*, 328 U. S. 582 (1946) for this distinction. Its reliance is misplaced, for the distinction drawn in *Davis* was not between commercial premises and residences, but between the private and public nature of the objects seized. Mr. Justice Douglas said in *Davis, supra*, at 589:

> "We are thus dealing not with *private* papers or documents but with *public* property in the custody of a citizen. The distinction between the two classes of property in the law of searches and seizures was recognized in *Wilson* v. *United States*, 221 U. S. 361."

And Mr. Justice Frankfurter, dissenting, not only made clear that the majority opinion did not hold that the search was validated by the distinction between commercial property and private residences, but warned of the serious danger in such a distinction:

> "An even more fundamental issue lurks in the Court's opinion if a casual but explicit phrase about the locus of the search and seizure as 'a place of business, not a private residence' is intended to carry relevant legal implications. If this is an indirect way of saying that the Fourth Amendment only secures homes against unreasonable searches and seizures but not offices—private offices of physicians and lawyers, of trade unions and other organizations, of business and scientific enterprises—then indeed it would constitute a sudden and drastic break with the whole history of the Fourth Amendment and its applications by this Court." 328 U. S. at 596.[5]

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[5] Though the premises involved here were used for commercial purposes, they were in fact "maintained as locked premises by defendant, and inaccessible to anyone except the defendant" (*supra*, p. 4).

The ordinance at issue here, in its breadth and absence of limitations, is not unlike the ordinance in *Eaton* v. *Price*, 364 U. S. 263 (1960), which permitted inspections by Housing Inspectors without a warrant, without probable cause or suspicion, and not as part of a systematic area-by-area search or periodic inspection. The decision of the Ohio Supreme Court upholding the ordinance's constitutionality was affirmed by an evenly divided court. The Supreme Court of Washington relied partially on *Eaton* to support its decision.

Taken together, *Frank* and *Eaton* still leave open the precise question presented in this case: *Frank*, because its ordinance, which required probable cause, is substantively different than the one at bar; *Eaton*, because affirmance by an equally divided court does not supply the rationale upon which the affirmance rests. As Mr. Justice Clark noted, the status of *Eaton* and *Frank* is "confused". *Eaton* v. *Price*, 360 U. S. 246, 250 (1959). Therefore, jurisdiction should be noted in order to consider the substantial federal question whether the Fourth and Fourteenth Amendments allow state officials to rummage freely about private business premises in the complete absence of reason to believe or suspect the presence of any condition towards which the inspection is directed. We believe that affirmance of the judgment below would reduce the protection against unreasonable searches "to the vanishing point." *Eaton* v. *Price*, 364 U. S. at 269.

2. *Frank v. Maryland Should Be Overruled.*

It has been approximately seven years since *Frank* v. *Maryland*, *supra*, was decided by a 5 to 4 decision of this Court, and since *Ohio ex rel. Eaton* v. *Price*, *supra*, decided two weeks later, underscored the Court's sharp disagreement in *Frank*. In the intervening years, decisions of this

Court have cast substantial doubt on the continuing viability of the indulgent view of the Fourth Amendment reflected in *Frank* and *Eaton*. See, e.g., *Marcus* v. *Property Search Warrant*, 367 U. S. 717 (1961); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Ker* v. *California*, 374 U. S. 23 (1963); *Stoner* v. *California*, 376 U. S. 483 (1964); *Beck* v. *Ohio*, 379 U. S. 89 (1964); *Stanford* v. *Texas*, 379 U. S. 476 (1965).

In a world where "politically controlled officials have grown powerful through an ever increasing series of minor infractions of civil liberties" (*Frank, supra,* at 382), it is not too early to review afresh all of the implications inherent in *Frank*. In brief, appellant seeks reversal of *Frank* as an unwarranted and dangerous intrusion upon the Fourth Amendment.[6]

CONCLUSION

For the reasons stated above, jurisdiction should be noted.

Respectfully submitted,

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[6] The problem is not isolated. See the jurisdictional statement filed recently in *Camara* v. *San Francisco Municipal Court*, No. 1139.